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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DOUGLAS MCARTHUR BUCHANAN, JR.,
Petitioner,

vs.

RONALD J. ANGELONE, Director,
Virginia Department of Corrections, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. In the final selection step of a capital sentencing proceeding, does a jury instruction which directs the jurors to consider all the evidence and return a life sentence if the death penalty is not justified violate the Eighth Amendment?

2. Would an affirmative answer to Question 1 be a "new rule," which cannot be created on habeas corpus?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

The present case involves the extended relitigation of the legality of a proceeding conducted many years ago, involving no question of whether petitioner is actually guilty. Such

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1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

unnecessary relitigation is contrary to the rights of victims and society which CJLF was formed to advance.

SUMMARY OF FACTS AND CASE

The facts of the case are set forth in the opinion of the Supreme Court of Virginia. *Buchanan* v. *Commonwealth*, 384 S. E. 2d 757, 760-761 (Va. 1989), J. A. 79-84. Additional facts are stated in the briefs of the parties and the opinion of the federal district court. J. A. 88-92. We summarize them here as necessary to frame the issues discussed in this brief.

Defendant Douglas Buchanan, Jr. was 19 years old at the time of the crime. Brief for Petitioner 5. He was married and lived with his wife separately from his father and stepmother. J. A. 89. Buchanan's mother had died when he was nine, and his father had remarried soon thereafter. Brief for Petitioner 6. The stepparent relationship was a poor one, and defendant demonizes the stepmother. *Id.*, at 6-7. Geraldine Buchanan is not able to tell her side of this story. Defendant has rendered her unavailable as a witness.

"On September 14, 1987, Buchanan and [his wife] talked about killing his parents. The two of them even drove to the Buchanan home that evening, but Buchanan decided not to kill anyone that night and they left." J. A. 89 (footnote omitted).

The next day, he had apparently reconsidered. He went to his father's house carrying a rifle and wearing rubber gloves. J. A. 79. After arguing with his father, Buchanan shot him in the back of the head as he was walking away. J. A. 80. He then shot him point blank between the eyes. *Ibid.*

When Buchanan's brothers, age 10 and 13, arrived home from school a few minutes later, he killed them both. J. A. 80. When Mrs. Buchanan arrived home, he killed her as well. J. A. 80-81. All four victims suffered multiple gunshots, stabbings, or both. *Ibid.* The evidence of planning was so clear that Buchanan was not entitled to second-degree murder instructions. *Id.*, at 83. At the penalty phase, a defense psychiatrist

testified regarding the psychological effects of Buchanan's childhood difficulties. Brief for Petitioner 8-9. Defense counsel argued for a mitigating circumstance of "extreme mental or emotional disturbance" based on this testimony. J. A. 61-66.

The jury returned the following verdict:

> "We, the Jury, on the issue joined, have found the defendant guilty of capital murder by having willfully, deliberately, and with premeditation killed Douglas McArthur Buchanan, Sr., Christopher Donald Buchanan, Joel Jerry Buchanan and Geraldine Patterson Buchanan as part of the same transaction and having found unanimously that his conduct in committing the murders of the above four victims, or any one of them, was outrageously or wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind or aggravated battery to the above four victims, or to any one of them, and having considered the evidence in mitigation of the offense, we unanimously fix his punishment at death." J. A. 77.

The Supreme Court of Virginia affirmed. *Buchanan* v. *Commonwealth*, 384 S. E. 2d, at 760. This Court denied certiorari on January 22, 1990, *Buchanan* v. *Virginia*, 493 U. S. 1063, making the decision "final" for retroactivity purposes.

The state trial court denied habeas relief, after an evidentiary hearing on ineffective assistance, in December, 1991. The Virginia Supreme Court denied appeal in June, 1992. This Court denied certiorari. *Buchanan* v. *Murray*, 506 U. S. 988 (1992).

Defendant filed a federal habeas petition, making 36 claims. J. A. 94-100. After an exhaustive opinion, see J. A. 100-199, the district court found that all of them were either defaulted or meritless. J. A. 199. The Fourth Circuit affirmed. *Buchanan* v. *Angelone*, 103 F. 3d 344, 351 (1996). The panel denied rehearing and no member of that court requested a poll on rehearing *en banc*. J. A. 215.

On April 28, 1997, this Court granted certiorari limited to Question 1 of the petition, J. A. 216, regarding the Eighth Amendment challenge to the penalty phase jury instructions. See Pet. for Cert. i. Question 2 was a due process challenge to the instructions based on a state statute. *Ibid.*

SUMMARY OF ARGUMENT

Defendant's attack on Virginia's jury instructions fails to distinguish between the two very different decisions in capital sentencing: the eligibility decision and the selection decision. Attacking the lack of structure in the selection decision, he ignores the substantial guidance and structure in Virginia's eligibility determination, which not only meets but exceeds constitutional requirements.

Once attention is properly focused on this Court's precedents regarding the selection decision, we see that structuring of that decision is permitted but not required. There is no requirement to list mitigating circumstances, and the instruction to consider all the evidence and decide if the death sentence is justified fully complies with the applicable precedents.

The Virginia statute containing a nonexclusive list of "facts in mitigation" raises no federal issue within the scope of the question on which certiorari was granted. The Virginia Supreme Court has reasonably interpreted that statute to not require reading the list to the jury, and its interpretation is binding on federal courts. This Court denied certiorari of the *Hicks* v. *Oklahoma* argument, and it is not properly before the Court.

Defendant's argument that juries cannot be trusted to recognize what facts call for a sentence less than death in a particular case is contrary to the premise on which the *Lockett* line of cases is based. Either that line was wrongly decided and should be overruled, or defendant's argument must be rejected.

ARGUMENT

Although defendant places his arguments under a single heading, see Brief for Petitioner 16, there appear to be three discernable contentions in his argument. First, he argues that the Virginia instruction provides the jury too much latitude, *i.e.*, "tells jurors that they may do anything they please for any reason or no reason . . . ." *Id.*, at 20. Second, he argues that "the instructions do not give the jury an appropriate 'vehicle' to consider the mitigation presented . . . ." *Id.*, at 23. Finally, defendant complains that the Virginia courts have not implemented what he perceives to be the mandate of the Virginia Legislature, which has listed a set of mitigating factors in the sentencing procedure statute. See *id.*, at 26. For brevity, these contentions could be called the *Furman* claim, see *Furman* v. *Georgia*, 408 U. S. 238 (1972), the *Penry* claim, see *Penry* v. *Lynaugh*, 492 U. S. 302, 328 (1989), and the statutory claim. See Va. Code Ann. § 19.2-264.4B. All are without merit.

I. Structuring of the final selection stage in capital sentencing is permitted but not required.

The basic flaw in defendant's *Furman* argument is his failure to adequately distinguish the separate parts of the capital sentencing process. In the jurisprudence developed since *Gregg* v. *Georgia*, 428 U. S. 153 (1976) and its companion cases, the stages of the process have very different requirements, and an argument that does not distinguish between them misses an essential point.

The two phases are "the eligibility decision and the selection decision." *Tuilaepa* v. *California*, 512 U. S. 967, 971 (1994). Their different requirements are most succinctly stated in *Lowenfield* v. *Phelps*, 484 U. S. 231, 246 (1988). "There is no question but that the Louisiana scheme narrows the class of death-eligible murderers and then at the sentencing phase allows for the consideration of mitigating circumstances and the exercise of discretion. The Constitution requires no more."

The first stage of the process is the definition of the death-eligible class, and in this stage the Constitution *requires* that the sentencer's discretion be limited. In the second stage, the determination of whether a death-eligible defendant will actually be sentenced to death, the Constitution *forbids* excessive limitations on the sentencer's discretion. See *McCleskey* v. *Kemp*, 481 U. S. 279, 303-304 (1987); *Graham* v. *Collins*, 506 U. S. 461, 468 (1993) (Souter, J., dissenting).

Other summaries of the Eighth Amendment requirements break out subparts of the two-stage structure. *Tuilaepa*, 512 U. S., at 971-972, notes several requirements for the eligibility decision. The death penalty must be a proportionate punishment for the crime according to federal constitutional standards. Also, the circumstances for eligibility set by state law must narrow the eligible class, and they must not be unconstitutionally vague.

Justice Stevens set forth a similar analysis in his dissent in *Graham*, 506 U. S., at 501-502, in which he identified "four important safeguards against arbitrary imposition of the death penalty." First, there is the proportionality requirement of *Enmund* v. *Florida*, 458 U. S. 782 (1982) and *Coker* v. *Georgia*, 433 U. S. 584 (1977). *Graham*, 506 U. S., at 501. Second, there is the requirement of a narrowing of the eligible class to something less than all murderers through statutory criteria. *Ibid.* Third, there is the requirement that these narrowing criteria not be so vague that they "fail to cabin sentencer discretion in the determination of death-eligibility . . . ." *Id.*, at 502-503. "Finally, at the end of the process, when dealing with the narrow class of offenders deemed death-eligible, we insist that the sentencer be permitted to give effect to all relevant mitigating evidence offered by the defendant, in making the final sentencing determination." *Id.*, at 503.

Which of these four safeguards does the Virginia system violate? None. It observes them all.

First, the various offenses which constitute capital murder in Virginia all require a "willful, deliberate, and premeditated killing." Va. Code Ann. § 18.2-31(1)-(11). There is no *Coker* or *Enmund* problem.

For the second requirement, Virginia not only narrows, it narrows twice. States may constitutionally narrow the eligible class either by defining a new crime of capital murder, as Texas does, or by requiring the finding of an "aggravating circumstance," as Georgia does. See *Lowenfield*, 484 U. S., at 244-246. Virginia, like Louisiana, does both. See *id.*, at 246; Va. Code Ann. § 18.2-31 (capital murder defined); *id.*, § 19.2-264.2 (additional aggravating criteria required).

The third hurdle is also easily cleared here. Defendant Buchanan killed four people instead of one. See Va. Code Ann. § 18.2-31(7). A clearer and more objective criterion for narrowing the eligible class is difficult to imagine.

In addition, this jury found true the circumstance that the offense "was outrageously or wantonly vile, horrible or inhuman *in that it involved torture, depravity of mind or an aggravated battery to the victim* . . . ." Va. Code Ann. § 19.2-264.2(1) (emphasis added). This Court held over 20 years ago that the italicized portion of this circumstance makes it sufficiently objective to pass constitutional muster. See *Proffitt* v. *Florida*, 428 U. S. 242, 255-256 (1976) (lead opinion) (narrowing construction of "especially heinous"); see also *Maynard* v. *Cartwright*, 486 U. S. 356, 363-364 (1988) (no real difference between "especially heinous" and "outrageously vile" instructions); *Godfrey* v. *Georgia*, 446 U. S. 420, 431-432 (1980) (plurality opinion) (same language would have appropriately limited "outrageously vile" if properly applied).

The eligibility determination in this case is thus unimpeachable, easily passing the three requirements. That leaves only the final selection decision as an issue. Defendant recognizes this early in his brief, Brief for Petitioner 17, and then proceeds to disregard the distinction later. He attacks Virginia's selection instruction with out-of-context quotes from cases discussing eligibility criteria. He quotes *Gregg* v. *Georgia*, 428 U. S. 153, 197 (1976) (lead opinion) for the proposition that the Georgia

system was constitutional because "the jury's attention is directed to the specific circumstances of the crime . . . ." Brief for Petitioner 20. But the circumstances listed immediately after that phrase in *Gregg* are *eligibility* circumstances. Once the eligibility "plane" has been crossed, those circumstances do "not play any role in guiding the sentencing body in the exercise of its discretion . . . ." *Zant* v. *Stephens*, 462 U. S. 862, 874 (1983).

The *amicus* supporting petitioner is similarly confused. After discussing the eligibility-criteria cases of *Godfrey* and *Maynard*, *amicus* asks, "If words such as 'heinous' provide insufficient guidance, then an instruction with no words and no content cannot possibly be enough." Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 4. This argument ignores the objective facts of the eligibility determination in this case, the same determination that was at issue in *Godfrey* and *Maynard*. "The willful, deliberate, and premeditated killing of more than one person . . . ." Va. Code Ann. § 18.2-31(7), does indeed provide more guidance than "heinous."

If the argument is that the state *must* provide a list of mitigating circumstances, in addition to a catch-all, that argument cannot survive this Court's repeated approval of the Georgia system. Georgia has no statutory list of mitigating circumstances. The Georgia statute lists the aggravating circumstances, one of which must be found for eligibility, and then directs the sentencer to consider any mitigating evidence. *Gregg*, 428 U. S., at 164, 197;[2] see also *Zant* v. *Stephens*, 456 U. S. 410, 411-412, n. 1 (1982) (*per curiam*) (text of instruction, no mitigating circumstances listed); Brief for Respondents, Argument B, note 3 and accompanying text (similarity of Virginia and Georgia systems). Gregg made the same attack Buchanan makes. The wide-open nature of mitigation in Georgia, he said, brought back the evils condemned in *Furman*.

2. This statute is now Ga. Code Ann. § 17-10-31.

428 U. S., at 203. This Court rejected the argument. *Id.*, at 203-204.

Cases since *Gregg* which have sustained attacks on the final selection phase of capital sentencing have all involved limitations on the sentencer's discretion, limitations on evidence, or injection of a prejudicial factor. Defendant has cited no case, and *amicus* CJLF is aware of none, in which this Court has overturned a sentence of a defendant properly convicted and properly found death-eligible on the ground that the sentencer was given *too much* discretion.

The first rule of the selection stage is that the death sentence cannot be mandatory. See *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (lead opinion). The sentencer must have *some* discretion.

Then the rule was established that the sentencer must not be precluded, by law or instructions, from considering any factor defendant proffers as mitigating. *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion); *Eddings* v. *Oklahoma*, 455 U. S. 104, 110 (1982). This discretion extends to each juror, even if the others find the proffered factor to be false. *Mills* v. *Maryland*, 486 U. S. 367, 375 (1988). Basing a sentence on answers to specific questions is invalid if the questions do not provide a "vehicle" to consider a particular mitigating circumstance, *Penry* v. *Lynaugh*, 492 U. S. 302, 328 (1989), a requirement discussed in part II, *post*. A corollary rule to *Lockett* is that evidence may not be excluded on the ground it is irrelevant if it is, in fact, relevant to a factor defendant is entitled to proffer under *Lockett*. *Skipper* v. *South Carolina*, 476 U. S. 1, 5 (1986).

Finally, the state may not inject prejudicial factors into the selection decision. Thus, membership in a racist prison gang may not be introduced if not relevant to a factor under consideration, because to do so would impair the First Amendment right of association. *Dawson* v. *Delaware*, 503 U. S. 159, 168 (1992). In addition, the jury may not be instructed in the final phase with "propositional" factors, *i.e.*, questions with a yes-or-

no answer, if those factors are excessively vague. *Tuilaepa* v. *California*, 512 U. S., at 974-975.[3]

None of these rules, and none of the concerns underlying these rules, is implicated by an instruction to consider all the evidence without enumerating specific mitigating factors. The jury in this case was not told it *must* sentence the defendant to death, as in *Woodson*. It was not told to focus exclusively on some mitigating factors to the exclusion of others, as in *Lockett*. It was not required to answer questions on which the mitigating evidence cannot help the defendant, as in *Penry*. It was not distracted with prejudicial factors, as in *Dawson*, or invalid aggravators as in *Stringer* v. *Black*, 503 U. S. 222, 232 (1992).

While reviewing the systems of other states, this Court has noted many times that states *may* provide the jury with additional guidance and identify the factors that society as a whole deems particularly relevant. See, *e.g.*, *California* v. *Ramos*, 463 U. S. 992, 999-1000 (1983); *Tuilaepa*, 512 U. S., at 984 (Stevens, J., concurring in the judgment). The fact that such additional guidance is permitted or desirable does not mean that it is required by the Constitution. Cf. *Harris* v. *Alabama*, 513 U. S. 504, 511 (1995) ("approbation" of standard used in Florida for jury override does not mean it is constitutionally required).

Defendant argues that Virginia's final selection step is "an unregulated, arbitrary, free-for-all." Brief for Petitioner 16. In other words, he complains that "the sentencer [is] given 'unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for the death penalty.' " *Tuilaepa*, 512 U. S., at 979-980 (quoting *Zant*, 462 U. S., at 875). This Court has repeatedly held such discretion to be valid. *Ibid.*

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3. Defendant cites *Tuilaepa*, at 973, for the proposition, "If the *explanation of mitigation* is 'too vague' . . . then the Eighth Amendment is violated." Brief for Petitioner 23 (emphasis added). *Tuilaepa* does not say that. The cited passage discusses vague factors, not explanation of the concept of mitigation.

II. Virginia's "justified" instruction correctly conveys the essence of *Lockett*.

At the penalty phase in the present case, the jury was instructed, "Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt" the truth of the statutory aggravating circumstance alleged by the prosecution. J. A. 73. The instruction went on,

> "If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the requirements of the preceding paragraph, then you *may* fix the punishment of the Defendant at death or if you believe *from all the evidence* that the death penalty is not *justified*, then you *shall* fix the punishment of the Defendant at life imprisonment." *Ibid.* (emphasis added).

The question is whether this instruction meets the individualized sentencing requirement of *Woodson* v. *North Carolina*, 428 U. S. 280 (1976) and its progeny, including *Lockett* v. *Ohio*, 438 U. S. 586 (1978) and *Penry* v. *Lynaugh*, 492 U. S 302 (1989). For the reasons that follow, *amicus* submits that this language not only meets the constitutional minimum, it conveys the essence of *Lockett* at least as well as other instructions approved by this Court. It does so better than the pre-1991 Texas instructions, which were upheld as applied in most cases.

It would be entirely proper to look to the verdict form, the arguments, and the evidence to bolster this conclusion. See *Buchanan* v. *Angelone*, 103 F. 3d 344, 348 (CA4 1996), J. A. 205; *Boyde* v. *California*, 494 U. S. 370, 384 (1990); Brief for Respondents, Argument D. This shoring up is not necessary, however. The instruction is correct on its face.

Defendant attacks the instruction as "scant," see Brief for Petitioner 16, as if brevity were a vice. It is not. Brevity is often a virtue in jury instructions. Elaborations meant to clarify an issue can end up confusing it.

Victor v. *Nebraska*, 511 U. S. 1 (1994) illustrates the point. The Constitution requires that juries find guilt "beyond a reasonable doubt." *Id.*, at 5. Naturally, the jury must be told of the standard. Beyond the "scant" words of the standard itself, to use defendant's term, "the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course." *Ibid.* Indeed, two circuits have held they should not, *id.*, at 25, n. * (Ginsburg, J., concurring in part), although opinion on that point is divided. See *id.*, at 26 ("the argument for defining the concept is strong"). The problem in *Victor* arose because Nebraska went considerably beyond a basic definition. See *id.*, at 18. Although ultimately upheld, this excessively elaborate definition was "somewhat problematic." *Id.*, at 19.

An instruction which is brief, or even "sparse," may convey the correct meaning better than one that goes on for pages. To see if Virginia's instruction conveys a meaning consistent with the *Lockett* line of cases, we must return to first principles.

The problem of sentencing discretion in capital cases was first addressed in depth in *McGautha* v. *California*, 402 U. S. 183 (1971). McGautha's jury, like Buchanan's, was told to consider the evidence presented. *Id.*, at 189. From that point, though, the jury was told " 'the law itself provides no standard for the guidance of the jury in the selection of the penalty, but, rather, commits the whole matter of determining which of the two penalties shall be fixed to the judgment, conscience, and absolute discretion of the jury.' " *Id.*, at 190.

Justice Harlan, writing for the majority, reviewed the history of capital punishment and discretionary sentencing. *Id.*, at 196-203. He noted the difficulty of structuring the sentencing decision. *Id.*, at 204. He reviewed both the Royal Commission recommendation for "unfettered discretion" and the Model Penal Code proposal for lists of aggravating and mitigating circumstances to be weighed against each other. *Id.*, at 205-206. The opinion then concluded that the latter approach is not constitutionally required.

"It is apparent that such criteria do not purport to provide more than the most minimal control over the sentencing authority's exercise of discretion. They do not purport to give an exhaustive list of the relevant considerations or the way in which they may be affected by the presence or absence of other circumstances. They do not even undertake to exclude constitutionally impermissible considerations. And, of course, they provide no protection against the jury determined to decide on whimsy or caprice. In short, they do no more than suggest some subjects for the jury to consider during its deliberations, and they bear witness to the intractable nature of the problem of 'standards' which the history of capital punishment has from the beginning reflected. Thus, they indeed caution against this Court's undertaking to establish such standards itself, *or to pronounce at large that standards in this realm are constitutionally required.*

"In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution. The States are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision and will consider a variety of factors, many of which will have been *suggested by the evidence or by the arguments of defense counsel*. For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for *no list of circumstances would ever be really complete*. The infinite variety of cases and facets to each case would make general standards either meaningless 'boiler-plate' or a statement of the obvious that no jury would need." *Id.*, at 207-208 (emphasis added, footnotes omitted).

To the extent that it upheld an absence of standards in the capital sentencing decision as a whole, *McGautha* was effec-

tively overruled by *Furman* v. *Georgia*, 408 U. S. 238 (1972). In the cases since *Furman*, though, we see that *McGautha* survives in a limited form. The eligibility decision addresses the concerns of *Furman*. See *Zant* v. *Stephens*, 462 U. S. 862, 877, n. 15 (1983). In the selection decision, *McGautha* is still good law.

The post-*Furman* revival of *McGautha* begins in *Woodson* v. *North Carolina*, 428 U. S. 280 (1976). The lead opinion gave three reasons for rejecting mandatory sentencing in capital cases. First, there was the long history of legislative rejection of mandatory sentencing. *Id.*, at 292-301. This was the same history relied on by *McGautha* for its approval of wide-open sentencing discretion, and *Woodson* relies on *McGautha* itself and the *Furman* dissent for this point. *Id.*, at 297.

Second, and most compellingly, *Woodson* observed that a mandatory death penalty for all first-degree murder would never be fully enforced. The powerful call for mercy in some cases would lead some juries to nullify, thus making the sentence depend on the willingness of jurors to disobey their instructions. *Id.*, at 302-303. This factor has nothing to do with the relative culpability of the defendant and invites discriminatory application. See Scheidegger, Capital Punishment in 1987: The Puzzle Nears Completion, 15 West. St. L. Rev. 95, 109 (1987). Finally, the *Woodson* lead opinion held that there was a constitutional imperative to consider not only the circumstances of the crime but also "the character and record of the individual offender . . . ." 428 U. S., at 304. This requirement was thought to flow from a need to treat the convicted persons as "uniquely individual human beings," rather than "members of a faceless, undifferentiated mass . . . ." *Ibid.*

Virginia's instruction violates none of the components of *Woodson*. By no stretch of the imagination could this be characterized as a mandatory death penalty. The instruction uses the permissive "may." There is no concern about jury nullification here, since the jury is expressly directed to return a life verdict whenever they feel the death penalty is not

justified. Finally, the wide-open admissibility of mitigating evidence combined with the express direction to consider it makes this an individualized procedure.

Renewed confidence in the ability of juries to exercise sentencing discretion continued in *Lockett* v. *Ohio*, 438 U. S. 586 (1978). The plurality quoted *McGautha* with apparent approval for the proposition "that 'jurors confronted with the truly awesome responsibility of decreeing death for a fellow human [would] act with due regard for the consequences of their decision.' " *Id.*, at 598.

After noting the abrupt change in *Furman*, *ibid.*, the retrenchment in *Gregg* and *Woodson*, *id.*, at 600-601, and the long history of discretionary sentencing, *id.*, at 602-603, *Lockett* announced its rule in the double negative form it has retained ever since. "[T]he sentencer . . . [must] *not* be *precluded* from considering, as a mitigating factor, any aspect of a defendant's character or record . . . ." *Id.*, at 604 (emphasis added and deleted). The "not precluded" construction of this sentence implies confidence that the jury will know what to consider as mitigating and how much weight to give it if only the state does not place barriers in its way.

True to this statement of the principle, all of the cases in the *Woodson-Lockett* line which overturn the sentence involve some kind of barrier between the sentencer and the decision that might have been reached on unfettered, unguided common sense. In *Eddings* v. *Oklahoma*, 455 U. S. 104, 109 (1982), the trial judge believed he was precluded by law from considering part of the mitigating evidence. For the context of judge sentencing, *Eddings* added the "corollary" rule that the sentencer "not refuse" to consider the mitigating evidence as a matter of law. *Id.*, at 114. *Skipper* v. *South Carolina*, 476 U. S. 1, 5 (1986) involved excluding from evidence, and thus concealing from the jury, facts needed for the full exercise of discretion. *Hitchcock* v. *Dugger*, 481 U. S. 393, 398-399 (1987) involved an instruction that effectively told the jury to disregard a category of mitigating evidence. All of these cases involve a

"*barrier* to the sentencer's consideration of all mitigating evidence . . . ." *Mills* v. *Maryland*, 486 U. S. 367, 375 (1988) (emphasis added). None of these cases cast doubt on the confidence of *McGautha* and *Lockett* that juries will consider the appropriate factors if no barriers are placed in their way.

The purpose of the *Lockett-Eddings* rule is to implement the requirement that "the sentencer is to make an individualized assessment of the *appropriateness* of the death penalty . . . ." See *Penry* v. *Lynaugh*, 492 U. S. 302, 319 (1989) (emphasis added). "Appropriate" and "justified," in this context, are synonymous, and this Court used these words interchangeably in *Sumner* v. *Shuman*, 483 U. S. 66, 78, 85 (1987). Although many states have followed the Model Penal Code and phrased the decision in terms of aggravating and mitigating factors, there is no constitutional requirement that those terms be used. See *Penry*, at 316 (discussing *Jurek* v. *Texas*, 428 U. S. 262 (1976)).

Mitigating evidence, by definition, is evidence that "calls for a sentence less than death." *McKoy* v. *North Carolina*, 494 U. S. 433, 439 (1990) (internal quotation marks omitted). "Calls for," again, is synonymous with "justifies" in this context. The essence of the selection decision has also been expressed as a "reasoned moral response" to the evidence. *Penry*, at 319 (quoting *California* v. *Brown*, 479 U. S. 530, 545 (1987) (O'Connor, J., concurring) (emphasis omitted)). Again, the word "justified" conveys the jury's normative function as the moral representative of the community.

Just as the argument that a state must list mitigating circumstances conflicts with past approval of the Georgia system, see *ante*, at 8-9, so a contention that jury instructions must use the word "mitigation" conflicts with the repeated approval of the Texas system as applied to most cases.

In the original Texas system, the sentence was based on the jury's answers to three "special issues," involving (1) deliberation and expectation death would result; (2) future dangerousness; and (3) provocation, if any, by the victim. See *Jurek*, 428

U. S., at 269 (quoting statute). "The Texas statute does not explicitly speak of mitigating circumstances; it directs only that the jury answer three questions. Thus, the constitutionality of the Texas procedures turns on whether the enumerated questions *allow* consideration of particularized mitigating factors." *Id.*, at 272 (emphasis added). The first and third factors allow some mitigation relating to the crime itself, such as lack of deliberation or reasonable response to provocation. Any character or background mitigation, however, could only come in through the second issue. *Jurek* held that the system was valid on its face based on the state court's interpretation of the statute "to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show." *Ibid.* Conspicuous by its absence from *Jurek* is any requirement that the instructions be altered to discuss mitigation.

The subsequent Texas cases confirm that the system is constitutional so long as it does not erect an actual barrier to the jury's consideration of a mitigating factor. There is no requirement that the instructions discuss mitigation as such. In *Franklin* v. *Lynaugh*, 487 U. S. 164, 177 (1988), the defendant objected that the second special issue did not allow adequate consideration of his good behavior during prior prison terms. The plurality found the argument foreclosed by *Jurek*. *Id.*, at 180. The concurrence held that, under the circumstances of the case, "the jury was *free* to give mitigating effect to this evidence in answering the special verdict question regarding future dangerousness." *Id.*, at 185 (emphasis added). Here again, we see that the requirement is that no barriers be placed in the way of a jury which decides that the evidence calls for a sentence less than death.

Penry was decided differently because, on the facts of the case, "a juror who believed that Penry's retardation and background diminished his moral culpability and made imposition of the death penalty *unwarranted* would be *unable* to give effect to that conclusion" under the first special issue. 492 U. S., at 323 (emphasis added). The second and third issues also provided no basis for favorable answers based on retarda-

tion on the facts of the case. *Id.*, at 323-324. The Virginia instruction would have passed with flying colors in *Penry*. "Justified" is the same as "warranted," and the jury would not only have been *able* to return a life sentence if it believed death was unwarranted based on all the evidence, it would have been expressly *directed* to do so.[4]

Finally, in *Johnson* v. *Texas*, 509 U. S. 350 (1993), a direct review case, this Court rejected a claim considerably stronger than Buchanan's claim in the present habeas case. Johnson's claim was that "the Texas special issues system in effect until 1991 did not allow his jury to give adequate mitigating effect to evidence of his youth." *Id.*, at 352 . Indeed, future dangerousness does not point the jury to the mitigating fact of youth; it requires a bit of stretch and may even cut the other way. See *id.*, at 368; *id.*, at 375 (O'Connor, J., dissenting). That did not render the Texas system unconstitutional as applied. "As long as the mitigating evidence is within 'the effective reach of the sentencer,' the requirements of the Eighth Amendment are satisfied." *Id.*, at 368 (quoting *Graham* v. *Collins*, 506 U. S. 461, 475-476 (1993)).

There can be no genuine doubt that Virginia's "justified" instruction places all mitigating evidence within the "effective reach" of the jury. To decide otherwise one would have to conclude that the jurors have no moral compass at all. Indeed, it was the conviction that jurors *would* react to mitigating circumstances, even when contrary to their instructions, that was the most convincing ground for the *Woodson* rule in the first place. See *ante*, at 14. Furthermore, the absence of limits in the Virginia instruction means that the "sentencer [is] allowed to give *full* consideration and *full* effect to mitigating circumstances," see 509 U. S., at 381 (O'Connor, J., dissenting)

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4. *Amicus* NADCL interprets *Penry* as striking down the Texas instructions for not being specific enough. Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 7, n. 4. On the contrary, the vice of the instruction in *Penry* was that it was *too* specific, as applied to that case, limiting the jury to factors for which Penry's retardation had no mitigating force.

(emphasis in original), which is at least desirable, even though *Johnson* narrowly rejected it as a constitutional requirement. Cf., *id.*, at 372 (majority).

The Virginia instruction not only complies with the letter of *Lockett* as well as other approved instructions, it complies with the spirit better than the pre-1991 Texas system as applied in *Johnson* and upheld as so applied. Unless the entire Texas line of cases is to be overruled, which would surely be a "new rule," this instruction must be upheld as correct on its face.

III. The question of whether the statutory list of "facts in mitigation" should be read to the jury is purely a question of state law.

At the time of Buchanan's trial, Va. Code Ann. § 19.2-264.4B read as follows:

> "B. In cases of trial by jury, evidence may be presented as to any matter which the court deems relevant to sentence, except that reports under the provisions of § 19.2-299, or under any rule of court, shall not be admitted into evidence.
>
> "Evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be limited to, the following: (i) The defendant has no significant history of prior criminal activity, (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, (iii) the victim was a participant in the defendant's conduct or consented to the act, (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired; (v) the age of the defendant at the time of the commission of the capital offense."

In quoting what he deems to be the "relevant" portion of this statute, defendant omits the first two sentences. Brief for Petitioner 11, n. 9. *Amicus* CJLF submits that these sentences are highly relevant. On its face, this statute is a rule of admissibility of evidence and not a standard for jury decision-making, and the court below so held. *Buchanan* v. *Angelone*, 103 F. 3d 344, 348 (CA4 1996), J. A. 206.

The first sentence states the general rule of admissibility of all relevant evidence but expressly excludes presentence reports. Such reports are routinely considered in noncapital sentencing, but have created problems in this context. See *Gardner* v. *Florida*, 430 U. S. 349, 353, 362 (1977). The second sentence defines relevant evidence, incorporating the "all mitigating evidence" rule of *Lockett* v. *Ohio*, 438 U. S. 586 (1978).

The second sentence uses the term "facts in mitigation" to describe a category of admissible *evidence*. The third sentence then fleshes out the definition with a nonexclusive list of several types of mitigating evidence.

Rules of evidence are addressed to judges, not juries. The judge does not typically inform a jury why evidence has been admitted or excluded, except in the limited circumstances where evidence is admissible for one purpose but not for another. See, *e.g.*, *Estelle* v. *McGuire*, 502 U. S. 62, 70-71 (1991). Interpretation of this statute as not requiring a jury instruction listing the factors is a reasonable interpretation. See *LeVasseur* v. *Commonwealth*, 304 S. E. 2d 644, 661 (Va. 1983) (so interpreting statute). In any event, the interpretation by the Virginia Supreme Court is absolutely binding on all federal courts. *Johnson* v. *Fankell*, 520 U. S. ___, 138 L. Ed. 2d 108, 115, 117 S. Ct. 1800, 1804 (1997).

In the court below, defendant argued that failure to instruct the jury with this list denied him a state procedural right in violation of the rule of *Hicks* v. *Oklahoma*, 447 U. S. 343, 346 (1980). See 103 F. 3d, at 348, J. A. 205-206. This was

Question 2 of the certiorari petition, see Pet. for Cert. i, and the grant of certiorari was limited to Question 1. J. A. 216.

Amicus CJLF believes strongly that the sweeping language of *Hicks* needs to be limited. If broadly interpreted, it conflicts with well-established limitations on federal power. Cf. *Estelle* v. *McGuire*, 502 U. S. 62, 71-72 (1991). We have not briefed this important issue in this case, however, because it is not fairly included in the question presented. We would welcome the opportunity to brief it in some future case where it is properly before the Court.

Aside from the *Hicks* issue, this statute raises no federal question in the present case. The state has no federal constitutional obligation to list mitigating circumstances to the jury. See *ante*, at 8-9. The highest court of the state says the statute creates no state-law obligation to do so, and its word on that question is final.

IV. Acceptance of defendant's argument would be a "new rule."

The foregoing argument on the "merits" of defendant's proposed rule also applies to the application of the "new rule" doctrine of *Teague* v. *Lane*, 489 U. S. 288 (1989). A proposition cannot be dictated by precedent, see *id.*, at 301, when the opposite is dictated by precedent. See *Gray* v. *Netherland*, 518 U. S. ___, 135 L. Ed. 2d 457, 475, 116 S. Ct. 2074, 2084 (1996). Further, the congruence of the Virginia instruction with the long-established principles of discretionary sentencing, see *ante*, at 12-19, establish that any contrary rule would not qualify for the extremely narrow second exception to *Teague*. See *Caspari* v. *Bohlen*, 510 U. S. 383, 396 (1994) ("narrow exceptions").

Defendant's proposed rule is contrary to precedent and to principles of sentencing that have been thoroughly considered and long accepted. It would necessarily be a new rule and a nonfundamental rule. It is therefore *Teague*-barred.

V. If defendant is correct, then *Lockett* was wrongly decided and should be overruled.

In the earlier parts of this brief, we have demonstrated how Virginia's instruction is fully consistent with this Court's precedents. The problem runs even deeper than that, however. The core of defendant's argument is his assertion that juries cannot be trusted to decide, without guidance, what factors should weigh against the death penalty in a particular case. See Brief for Petitioner 24. Yet *Lockett* v. *Ohio*, 438 U. S. 586 (1978) and its progeny unequivocally forbid a state from telling jurors which factors do *not* weigh on that side. For example, if a state wanted to decide, as a matter of public policy, that voluntary intoxication is simply not mitigating, it would not be permitted to do so in the penalty phase of a capital case, even though it unquestionably can do so in defining substantive criminal law. Cf. *Montana* v. *Egelhoff*, 518 U. S. ___, 135 L. Ed. 2d 361, 372, n. 4, 116 S. Ct. 2013, 2020-2021, n. 4 (1996) (plurality opinion); *id.*, at 377, 116 S. Ct., at 2024-2025 (Ginsburg, J., concurring in the judgment); *id.*, at 385, 116 S. Ct., at 2031 (O'Connor, J., dissenting); *id.*, at 386, 116 S. Ct., at 2032 (Souter, J., dissenting). On the defendant's side, *Lockett requires* states to allow juries to make up principles of mitigation as they go along. Cf. Brief for Petitioner 24.

The *Lockett-Eddings-Penry* line of cases has not gone unchallenged. See *Lockett*, 438 U. S., at 623 (White, J., dissenting in part); *Walton* v. *Arizona*, 497 U. S. 639, 667 (1990) (Scalia, J., concurring in part and concurring in the judgment); *Graham* v. *Collins*, 506 U. S. 461, 492-495 (1993) (Thomas, J., concurring). If defendant is right that juries cannot be trusted to decide what is mitigating without bringing back the evils of the pre-*Furman* era, then the premise of *Lockett* collapses, and its critics are right. There would then be no legitimate reason for preventing the states from telling jurors what factors are *not* mitigating.

The goal of this entire body of case law is, after all, to avoid discrimination and arbitrariness, not to minimize the number of

death verdicts. See *Graham*, 506 U. S., at 501 (Stevens, J., dissenting). Discrimination in leniency is still discrimination. See *McCleskey* v. *Kemp*, 481 U. S. 279, 336 (1987) (Brennan, J., dissenting). If the jury is to be "channelled," the channel must have two banks.

Either juries can be trusted to decide what factors are mitigating in a particular case or they cannot. If they cannot, *Lockett* and its progeny were wrongly decided and should be overruled. If they can, defendant's claim must be rejected.

CONCLUSION

The decision of the Court of Appeals for the Fourth Circuit should be affirmed.

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Respectfully submitted,

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